Gooi Loo Seng v Public Prosecutor

SUPREME COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 05-155-91

ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND WAN YAHYA SCJJ

19 APRIL 1993

Criminal Procedure *— Trial — Miscarriage of justice — Accused charged with trafficking in dangerous drugs — Failure of trial judge to direct himself correctly*

Criminal Procedure *— Trial — Presumption against accused — Trafficking in dangerous drugs — Others had access to room where heroin was concealed — Accused not presumed to be in possession or having control even if he has knowledge of presence of the heroin — Dangerous Drugs Act 1952 s 37(d) & (da)*

The appellant was charged with the offence of trafficking in a dangerous drug. The facts showed that after the appellant was detained by the police, he brought the police to the room occupied by him and his girlfriend, where the police recovered from the bottom of a plastic cupboard two packages containing some substance which were later found to be heroin. A search list was prepared and signed by the officer in charge, Insp Nordin. Although Insp Nordin gave evidence that the packages were recovered from the cupboard by the appellant, the search list showed that it was Insp Nordin who recovered the packages. The appellant maintained that it was Insp Nordin who found the heroin and he denied all knowledge of the presence of the heroin in the room. There was also evidence that the appellant's girlfriend sometimes brought her friends to the room. The learned trial judge found that the prosecution had successfully invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952. He ruled that the prosecution had established a prima facie case against the appellant. The appellant appealed.

Held, allowing the appeal:

(1) The trial judge did not seem to recognize that the appellant's girlfriend might have had every possible motive to supress the truth bearing in mind that she was an obvious suspect. The appellant's girlfriend and her friends could have had access to the room if they so wished. The trial judge had as a result rejected the crucial part of the defence case which was that the heroin was concealed in the room without his knowledge.

(2) The trial judge had failed to recognize the significance of the contents of the search list, in that it told a materially different story to that deposed by Insp Nordin.

(3) Even if the appellant had knowledge of the presence of the heroin in the room, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others had access to the room and could have concealed the heroin there.

(4) The trial judge did not view the whole of the evidence objectively and from all angles with the result that the appellant had lost the chance which was fairly open to him of being acquitted. Had the trial judge approached the prosecution cases in the proper manner as indicated it could not be confidently said that he would or must inevitably have rejected the appellant's version that he had no knowledge of the presence of the heroin in the room and that it could have been hidden there by others having access to the room in his absence. In these circumstances, a miscarriage of justice may well have occurred.

[Bahasa Malaysia summary

Perayu telah dituduh atas kesalahan mengedar dadah berbahaya. Fakta kes ini menunjukkan bahawa selepas perayu ditahan oleh polis, beliau telah membawa polis ke bilik yang didiami olehnya dan teman wanitanya, di mana pihak polis telah menjumpai di bawah sebuah almari plastik, dua bungkusan yang mengandungi sejenis bahan yang kemudiannya didapati merupakan ganja. Suatu senarai geledah telah disediakan dan ditandatangani oleh pegawai polis yang bertanggungjawab, Insp Nordin. Walaupun Insp Nordin memberi keterangan bahawa bungkusan itu telah dikeluarkan dari almari itu oleh perayu, senarai geledah menunjukkan bahawa Insp Nordin yang telah mengeluarkan bungkusan itu. Perayu berhujah bahawa Insp Nordin yang telah menjumpai ganja itu dan beliau menafikan yang beliau mengetahui mengenai kehadiran ganja itu. Hakim yang arif telah memutuskan bahawa pihak pendakwa telah berjaya menggunakan anggapan dibawah s 37(d) Akta Dadah Berbahaya 1952. Beliau memutuskan bahawa pihak pendakwa telah membuktikan suatu kes prima facie terhadap perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim perbicaraan tidak nampaknya menyedari bahawa teman wanita perayu mungkin mempunyai motif untuk menyekat perkara yang sebenar daripada diketahui memandangkan bahawa beliau merupakan seorang yang disyaki. Teman wanita perayu dan kawan-kawannya mempunyai peluang masuk ke dalam bilik itu jika mereka mengkehendaki berbuat demikian. Oleh itu, hakim perbicaraan telah menolak sebahagian kes perayu yang penting yang menunjukkan bahawa ganja itu disembunyikan di dalam bilik perayu tanpa pengetahuannya.

(2) Hakim perbicaraan telah gagal menyedari kepentingan kandungan senarai geledah, di mana senarai itu memberi gambaran yang berlainan daripada yang didepos oleh Insp Nordin.

(3) Walaupun perayu tahu mengenai kehadiran ganja itu di dalam biliknya, itu secara sendirinya tidak mencukupi untuk menunjukkan bahawa beliau memiliki atau mengawal ganja itu memandangkan bahawa terdapat orang lain yang mempunyai peluang masuk ke dalam bilik itu dan berpeluang menyembunyikan ganja itu di situ.

A (4) Hakim perbicaraan kes tidak melihat keseluruhan keterangan secara objektif dan dari semua segi dan oleh itu perayu telah kehilangan peluang yang terbuka kepadanya untuk dibebaskan. Jika hakim perbicaraan meneliti kes pihak pendakwa dengan cara yang betul seperti yang disebut, tidak boleh dikatakan dengan pasti bahawa beliau mungkin atau pasti akan menolak versi perayu
B bahawa beliau tidak tahu mengenai kehadiran ganja itu di dalam biliknya dan bahawa ia mungkin disembunyikan di sana oleh orang lain yang mempunyai peluang masuk ke dalam bilik itu bila beliau tidak berada di situ. Di dalam keadaan itu, salah laksana keadilan mungkin telah berlaku.]

C **Cases referred to**

1 *R v Bundy* 5 Cr App R 270 (refd)

Appeal from: Criminal Trial No 58–8–87 (High Court, Johor Bahru)

D *Teh Poh Teik* (*Teh Poh Teik & Co*) for the appellant.
Idris Harun (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr SCJ (delivery the grounds of judgment of the court): This appellant was prosecuted in the High Court at Johor Bahru, before
E James Foong JC (as he then was) upon the following charge:

> That you, Gooi Loo Seng IC No 4629774(B) on 20 August 1986 at about 10pm in a room in house no 89 Jalan Baldu 2, Taman Sentosa, Johor Bahru, in the state of Johor, were found trafficking in a dangerous drug, to wit, heroin, having a net weight, in all, of 22.469g, on your own behalf, and that you have accordingly
F committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, and punishable under s 39B(2) of the same Act.

At the conclusion of the trial, he was convicted and sentenced to death and against that conviction he had appealed.

According to the evidence led by the prosecution on 20 August 1986 at
G about 9.30pm, as a result of information received, Insp Nordin Kadir (PW6) led two of his men, detective corporal Muda Mohd (PW7) and detective constable Wahid (not called though identified) to a place near a public telephone booth in Jalan Cokmar, Taman Sri Tebrau, Johor Bahru, and took up ambush position there. A short while later, a motor car bearing registration no JAL 1207 pulled up nearby. The driver — a male Chinese
H — identified as the appellant, alighted and leaned against the car. It was at this point of time that Insp Nordin and his men emerged and approached the appellant, identified themselves, and proceeded to search his person and his car but recovered nothing incriminating.

On the request of Insp Nordin, the appellant then led the police party to
I his place of abode, which was a bedroom he had rented and comprised in the ground floor of No 89, Jalan Baldu, a double storey dwelling house. It was common ground that the appellant was not the only person who slept in this bedroom, for his girlfriend, a bar girl named Tan Ah Kwai (PW4), also did so, at least, about twice a week.

Upon entering the bedroom, Insp Nordin found no one in and instructed Wahid to conduct a search of it. So, Wahid approached a plastic cupboard, but before he could proceed to search it, it was said that the appellant prevented him from doing so, and somewhat obligingly, himself recovered from the bottom of the plastic cupboard, in between some clothes, two newspaper packages, which he promptly handed over to Insp Nordin, who, on opening the first package, found enclosed therein, 15 plastic packets containing a granular substance suspected to be heroin. Similarly, on opening the second package, Insp Nordin found in it a plastic packet containing a granular substance suspected to be heroin. During the search he conducted, Wahid recovered from the top portion of the plastic cupboard three empty plastic packets and the appellant's passport and a sum of RM1,039 in cash. Insp Nordin then took possession of all the exhibits aforesaid, arrested the appellant, and brought him to the police station, where the exhibits were properly marked.

Subsequently, the suspected heroin was examined and analyzed by the government chemist who confirmed Insp Nordin's suspicions by certifying it was indeed heroin, a dangerous drug within the meaning of the Dangerous Drugs Act 1952 ('the Act') weighing in all 22.469g.

A second search of the same bedroom conducted by the police during the small hours of the morning of 21 August 1986, resulted in the recovery of a Dunhill briefcase containing RM5,930 in cash, the property of the appellant.

No women's clothing or personal effects were however recovered from the bedroom during either search.

Going back a little, we must interpolate to mention, that the version of the prosecution regarding the events during the initial search in the bedroom was glaringly at variance with the contents of a contemporary document, to wit, a search list, prepared and signed by Insp Nordin himself, at 10pm on 28 August 1986 — in other words, immediately, after the seizure of the exhibits — on one important point, namely, who had found the suspected heroin? According to the search list, it was Insp Nordin who had found the suspected heroin. In other words, no mention was made in the search list that it was the appellant who had himself recovered the two newspaper packages containing the heroin from the bottom of the plastic cupboard and then handed them to Insp Nordin. Nor was Wahid called to give his version of the events. These are points to which we shall be returning when we come to consider the grounds of decision of the trial judge.

At the trial, there was also called by the prosecution the appellant's girlfriend, Tan Ah Kwai, who admitted that she held a set of keys to the bedroom, that she had used the bedroom as her own, that she shared the same bed there with the appellant, on the average for one or two nights a week, and that following the arrest of the appellant, she had gone to the police station and there taken delivery of the appellant's car. She was at pains to add that whenever she was in the bedroom, the appellant was around and that she had her own accommodation at a hostel provided by her employer. The trial judge said that he *tended to believe* her story as she appeared to be a truthful and straightforward witness.

The landlord, Kam Lok Nga (PW3) was also called as a witness for the prosecution. He testified that when the appellant had approached him to

A rent the bedroom he was accompanied by Tan Ah Kwai; that the appellant had introduced her as his wife; that after it had been let to the appellant, she had slept in it; and that after the appellant's arrest she had removed all personal effects in it and also paid a month's rental.

At the close of the case for the prosecution the trial judge found that the prosecution had successfully invoked the presumption under s 37(d) of the B Dangerous Drugs Act 1952, and so the appellant was deemed to be in possession of the heroin, and as its weight exceeded 15g, he was by reason of the presumption under s 37(da)(i), to be presumed, until the contrary was proved, to be a trafficker in the same. He accordingly ruled that the prosecution had established a prima facie case against the appellant which, C if unrebutted, would warrant a conviction, and so called upon the appellant to enter upon his defence.

Upon his defence being called the appellant elected to give evidence on oath.

He freely admitted the circumstances under which he was detained by the police at Jalan Cokma Satu, near a telephone booth and explained that D he was then intending to make a telephone call to his girlfriend, Tan Ah Kwai, to enquire when she would be finishing work so that he could have supper with her.

Turning to the events in his bedroom, in particular, the search there conducted by Insp Nordin and his men, he denied that it was he who recovered the heroin from the cupboard. He maintained that it was Nordin E who had found the heroin in the cupboard and he went on to deny all knowledge of the presence of the heroin in the bedroom. He also testified that he did not have exclusive access to the bedroom as his girlfriend, Tan Ah Kwai, and some of her friends she used to invite to play cards also had access thereto. One such friend was a woman named Ling Ling who was F identified in court by Tan Ah Kwai under cross-examination as her colleague who worked at the same bar, though not called to testify.

The trial judge thought it rather puzzling that the defence having caused Ling Ling to be identified did not then call her to testify, and went on to say, that as a result, he could not help but infer that the allegations of the appellant about Tan Ah Kwai inviting her friends like Ling Ling to the G bedroom for gaming, were not true. This inference ought not to have been drawn by the trial judge as the appellant was at liberty to call such evidence as he thought fit. Be that as it may, we note that Tan Ah Kwai had first said under cross-examination that she had never brought her friends to the bedroom but, soon after her attention was drawn to Ling Ling, she resiled somewhat and said that she could not recall if she had brought friends to H the bedroom during the absence of the appellant.

We note also that the trial judge accepted at full face value the testimony of Tan Ah Kwai that although she had a set of keys to the bedroom she *never* ever entered it when the appellant was not in. In thus accepting the testimony of Tan Ah Kwai, the trial judge does not seem to have recognized I that Tan Ah Kwai might have had every possible motive to suppress the truth and to lie, if necessary, at the expense of the appellant, bearing in mind that she was an obvious suspect. In any event, we consider that Tan Ah Kwai's testimony on this point was, to put it mildly, an improbable story. The fact of the matter was that she could have had access to the

bedroom, and if necessary, with her friends, without attracting the attention of the appellant, if she so wished. The trial judge however adopted a Nelsonian approach to Tan Ah Kwai's testimony, and as a result, rejected the crucial part of the defence case which was that the heroin was concealed in his bedroom without his knowledge.

But, of equal importance, was the point that the trial judge failed to recognize the significance of the contents of the search list; in particular, as we have already remarked, that it told a materially different story to that deposed to by Insp Nordin regarding the circumstances under which the heroin was recovered, and as a result, he inferred that the appellant had custody and control of the heroin and knew of its nature.

The search list, prepared by Insp Nordin himself, virtually on the spot, was entirely consistent with the appellant's version that it was not he but Insp Nordin who had found the heroin at the bottom of the plastic cupboard, and so flatly contradicted Insp Nordin's version that it was the appellant who had prevented Wahid from conducting a search of the plastic cupboard, and had then obligingly recovered the heroin from the bottom of the cupboard and handed it over to Insp Nordin. And Wahid, though available, was not called by the prosecution.

Had the trial judge approached the prosecution case in the manner we have indicated, we cannot confidently say that he would or must inevitably have rejected the appellant's version that he had no knowledge of the presence of the heroin in the bedroom and that it could have been hidden there by others having access to the bedroom in his absence.

We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy*:[1] '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.

We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Accordingly, we had no alternative but to allow the appeal, quash the conviction and to substitute in lieu thereof, an order of acquittal and discharge.

Appeal allowed.

Reported by Prof Ahmad Ibrahim